

¹ Through an apparent clerical error, there is another Award contained within the file that was signed and dated February 5, 2007. With the exception of two typographical errors the dates on which they were signed, the two documents are identical. Respondent appealed the February 1, 2007 Order and it appears that the second document, dated February 5, 2007 was mailed to some but not all of the parties. At oral argument the parties agreed that the second document is ineffectual and irrelevant to this appeal.

ISSUES

Citing *Johnson*², the ALJ concluded the claimant did not suffer injury out of and in the course of employment when he knelt down to address a mechanical issue with a copy machine. The ALJ analogized this as an activity of day-to-day living and therefore he declined to award claimant any compensation under the Kansas Workers Compensation Act (Act).

The claimant requests review of this decision asserting that the *Johnson* holding is not so expansive so as to foreclose the claimant's recovery in this matter. Conversely, respondent argues that claimant's knee injury was an act of coincidence, in that it just happened to occur while at work. Thus, the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 24, 2006, claimant, a Traffic Safety Officer for the City of Overland Park, was at work preparing for a training session. He was in the process of making copies when the machine jammed. He knelt down on one knee to repair the machine and as he arose, part of his bony structure in his right knee sloughed off. This was as a result of a condition called osteochondritis dissecans, a condition which all physicians agree claimant had before this date. However, his condition was asymptomatic.

According to Dr. Prostic and Dr. Mendlick, the osteochondritis dissecans was a pre-existing condition but the mechanism of squatting and then returning to a standing position caused a portion of the knee to come loose.³ Dr. Prostic further testified that such events occur when the knee is significantly flexed and with a twist.⁴ However, Dr Brown testified that the loose body was not caused by the act of standing up after kneeling. Rather, "any time there's motion across it, that piece can go ahead and come off" . . . , loading or flex it under load.⁵ And Dr. Prostic agreed that this injury could have occurred away from work and "it was basically a coincidence that it occurred at work."⁶

² *Johnson vs. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

³ Prostic Depo. at 16; Ex. 1 (Dr. Mendlick, office note 2/1/06).

⁴ *Id.* at 17

⁵ Brown Depo. at 7.

⁶ Prostic Depo. at 17.

The ALJ made the following observations:

It is evident that [c]laimant's experience at the copy machine was not an accident in the sense originally contemplated by the Kansas Workers Compensation Act. Respondent asserts it was from an activity in normal living such as that concerned in . . . [*Johnson*], although both occurred while [c]laimant was "at work." In fact in this case it is not even certain that it was an accident at all, but rather part of the deterioration of [c]laimant's knee joint that happened while he was at work and not even doing his regular duties, at that. . .

So it seems the best course at this time is to deny the compensability of this occurrence. As noted by the Court of Appeals in the *Johnson* case, "an injury is compensable only if, inter alia, [sic] the "employment exposes the worker to an increased risk of injury of the type actually sustained".⁷

At the respondent's urging, the ALJ attempted to follow the holding set forth in *Johnson*, a recent Kansas Court of Appeals case. *Johnson* involved an office worker who, while working, rose from her chair and pivoted, causing a knee injury. Although both the ALJ and the Board concluded that her injury was compensable, a panel of the Court of Appeals concluded it was not. They reasoned that -

An injury is compensable only if, *inter alia*, the "employment exposes the worker to an increased risk of injury of the type actually sustained."⁸

And because claimant could have injured herself at home while standing up, performing an act of day to day living, then this event was not compensable.

The ALJ concluded that, like the claimant in *Johnson*, this claimant's act of bending down on one knee to clear the paper from the copier and then returning to a standing position was not an accident. Rather, the injury was not compensable because the act was something claimant could have done elsewhere and was not specific to his job. Thus, there was no increased risk of injury associated with this physical maneuver.

Claimant maintains this is an overly broad interpretation of *Johnson* while respondent maintains the ALJ appropriately applied the case law.

The Board has considered the parties' arguments and concludes that the evidence contained within this record and concludes the ALJ's Award should be affirmed.

⁷ ALJ Award (Feb. 1, 2007) at 6.

⁸ *Johnson*, 36 Kan. App. 2d at 789.

K.S.A. 2005 Supp. 44-508(d) defines “accident”:

Accident means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2005 Supp. 44-508(e) defines “personal injury” and “injury”:

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The foregoing statute, which defines “injury” excludes “normal activities of day-to-day living” from being found to have been caused by the employment.

Unfortunately, the Act does not define the phrase “normal activities of day-to-day living.” Attempting to provide that phrase with a reasonable interpretation, the Board has previously held that K.S.A. 2005 Supp. 44-508(e) is a codification of the *Boeckmann*⁹ decision where the Kansas Supreme Court denied benefits as Mr. Boeckmann’s arthritic condition progressively worsened regardless of his activities. There the Court said:

. . . there is no evidence here relating the origin of claimant’s disability to trauma in the sense it was found to exist in *Winkelman*. No outside thrust of traumatic force assailed or beat upon the workman’s physical structure as happened in *Winkelman*.¹⁰

The Court in *Boeckmann* distinguished cases in which “the injury was shown to be sufficiently related to a particular strain or episode of physical exertion” to support a finding of compensability.¹¹ The Board concludes that the Legislature did not intend for the “normal activities of day-to-day living” to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.

⁹ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

¹⁰ *Id.* at 736.

¹¹ *Id.* at 737.

The difficulty the Board has with the ALJ's ruling and with *Johnson* is that they both seem to focus exclusively on the mechanism of injury rather than considering the resulting disability. For example, in *Johnson*, that panel of the Court of Appeals focused on the claimant's activity of standing up to reach for work materials. And because she would be compelled to stand up elsewhere, that panel found her injury was not compensable. Here, it was the claimant's act of kneeling to clear the copy machine, a maneuver he undoubtedly performed outside of work.

The Board believes the more appropriate focus is on the resulting disability and how it relates to the injury. When that analysis is applied to the instant set of facts, the majority of the Board is persuaded, based upon the medical testimony, that claimant suffered from a coincidental knee injury rather than a work-related accident. According to Dr. Brown, claimant's knee injury could have happened at any time regardless of the mechanics of his leg movement. The Board is not so persuaded by Dr. Prostic's testimony where he indicated that the act of kneeling caused this piece of bone to break free because his opinion includes the contention that claimant was twisting when in fact, there is no such testimony in the record.

Claimant had a preexisting disease process at work on his knee before he knelt to clear this paper jam. Although a preexisting condition does not necessarily preclude an entitlement to workers compensation benefits¹², the dispute at the heart of this case is not whether the act of kneeling before a machine to address a paper jam while in the process of performing normal work duties constitutes a normal activity of day to day living, but rather whether claimant's injury and resulting disability was the result of the normal activities of day to day living. In other words, like in *Boeckmann*, would the resulting disability have occurred regardless of the incident at work given the preexisting condition of claimant's knee? The expert medical opinion testimony says yes it would and thereby places this case squarely within the rule of *Boeckmann*. If claimant were compelled to do this maneuver repetitively throughout the course of his job, exposing him to additional risk, then the Board's conclusion would be different. But that is not the evidence and based upon these facts, a majority of the Board finds the injury to have been the result of a personal risk. Therefore, the ALJ's Award should be affirmed.

Finally, we would point out that contrary to the minority's contention in its Dissent that "the majority's opinion reads *Johnson* far too expansively", in fact, the majority is relying on *Boeckmann*, not *Johnson* for this holding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 1, 2007, is affirmed.

¹² *Odell v. United School District*, 206 Kan. 752, 481 P.2d 974 (1971).

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's decision and would find claimant's work-related injury compensable. Claimant, while in the scope and course of his employment, knelt down to clear a paper jam. As he returned to a standing position, he was injured when a portion of his knee broke free causing him pain. Unlike the claimant in *Johnson*, claimant had, up to that point, suffered no physical problems with his knee.

While it is certainly true that this injury could have occurred elsewhere, that fact alone should not be determinative. To use respondent's own phrase, much of life is an "act of coincidence." But it is the connection to work that transforms that act into a compensable act. Kneeling to repair this machine was part and parcel of this individual's job duties. This activity is "fairly [if not obviously] traceable to the employment".¹³ And in the process of performing that job duty, his injury occurred. There is no evidence that claimant had suffered any complaints related to his knee before the moment he knelt to repair this paper jam, all while in his employer's service. No where in this record is there any evidence that claimant was engaged in an activity that was not approved or appropriate. But because claimant *might have* knelt outside the workplace and this piece of bone *might have* broken free, at least according to the majority, he is foreclosed from receiving benefits.

¹³ *Siebert v. Hoch*, 199 Kan. 299, Syl ¶ 5, 428 P.2d 825 (1967).

To the extent *Johnson* needs to be distinguished, the difference can be found in the fact that this claimant had absolutely no symptoms in his knee before the day of his accident. The same cannot be said of the injured employees in *Johnson* or *Boeckmann*. And the fact that those individuals in *Johnson* and *Boeckmann* both had ongoing histories of preexisting problems can justify a denial of benefits when the resulting disability merely flows as a result of the progression of the condition due to day to day activities.

It is worth noting that the *Guides*¹⁴ have defined day-to-day activities.

In the *Guides*, impairments are defined as conditions that interfere with an individual's "activities of daily living." . . . Activities of daily living include, but are not limited to, self-care and personal hygiene, eating and preparing food; communication, speaking and writing, maintaining one's posture, standing, and sitting; caring for the home and personal finances; walking, traveling, and moving about; recreational and social activities; and *work activities*.¹⁵

Thus, under the *Johnson* rationale, those things that are done by a worker in his every day life, *including work activities*, are essentially non compensable as they are an activity of daily life. Surely the Court of Appeals could not have intended such a result.

Whether a particular injury arises out of and in the course of a claimant's employment is a highly fact driven determination. These Board Members believe that the majority's opinion reads *Johnson* far too expansively and would reverse the ALJ's Award and grant claimant the benefits he seeks based upon the parties' stipulation.

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Kip A. Kubin, Attorney for Self-Insured Respondent
Robert H. Foerschler, Administrative Law Judge

¹⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

¹⁵ *Guides*, at 1, paragraph 1.1.